(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)
Adcom Wire, d/b/a Adcom Wire Company	) RCRA Appeal No. 92-2
Permit No. FLD 053 105 821	)

[Decided September 3, 1992]

ORDER DENYING REVIEW

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum and Edward E. Reich.

ADCOM WIRE, D/B/A/ ADCOM WIRE COMPANY

RCRA Appeal No. 92-2

ORDER DENYING REVIEW

Decided September 3, 1992

SYLLABUS

Adcom Wire Company seeks review of the corrective action requirements in the federal portion of a RCRA permit issued by EPA Region IV for Adcom's wire manufacturing facility in Jacksonville, Florida. During the relevant period, Adcom's wire cleaning process generated rinse water as an effluent. For a time (the parties dispute how long), the rinse water was held in a rubber-lined surface impoundment before treatment. The corrective action requirements being challenged here were imposed to address releases caused by the use of the surface impoundment to hold the rinse water. Adcom argues that the Region does not have authority to issue the federal portion of the permit because: (1) Adcom did not treat, store, or dispose of hazardous waste after November 19, 1980, when the applicable RCRA regulations became effective; and (2) the state-issued portion of the permit has expired and was invalid to begin with because the permit application submitted by Adcom to the State of Florida was defective. Adcom also argues that, if the Region does have authority to issue the HSWA permit, the permit should be changed to reflect certain technical comments that Adcom submitted to EPA during the comment period on the draft permit.

Held: (1) the Region was not clearly erroneous in its determination that the rinse water generated by Adcom's facility was a hazardous waste subject to regulation under RCRA; (2) whether the state-issued portion of the permit is defective or has expired are issues that relate solely to the state-issued portion of the permit and are neither subject to federal administrative review nor relevant to the validity of the EPA-issued HSWA portion of the permit; and (3) Adcom's incorporation by reference of certain "technical comments" that Adcom made during the comment period on the draft permit does not meet the requirements of 40 CFR §124.19(a). Review of Adcom's petition is therefore denied.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Firestone:

Adcom Wire Company seeks review of the corrective action requirements in the federal portion of a permit issued to Adcom by U.S. EPA Region IV under the Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act of 1976 RCRA), for Adcom's wire manufacturing facility in Jacksonville, Florida. [1] Adcom argues that the Region does not have jurisdiction to issue the permit because: (1) Adcom did not treat, store, or dispose of hazardous waste after November 19, 1980, when applicable RCRA regulations became effective; and (2) the state-issued portion of the permit has expired and was invalid to begin with because the permit application submitted by Adcom to the State of Florida was defective. Adcom also argues that, if the Region does have authority to issue the HSWA permit, the permit should be changed to reflect certain technical comments that Adcom submitted to EPA during the comment period on the draft permit. As requested by the Agency's Judicial Officer, the Region filed a response to the petition for review. [2] For the reasons set forth below, review of Adcom's petition is denied.

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[1] The non-HSWA portion of the permit was issued by the State of Florida, an authorized state under RCRA §3006(b), 42 U.S.C. §6926(b).

[2] At that time, the Agency's Judicial Officers provided support to the Administrator in his review of permit appeals. Subsequently, effective on March 1, 1992, the position of Judicial Officer was abolished, and all cases pending before the Administrator, including this case, were transferred to the Environmental Appeals Board. See 57 Fed. Reg. 5321 (Feb. 13, 1992).

I. *BACKGROUND*

Adcom's wire cleaning process generates two separate wastewater effluents: spent pickle liquor and rinse water. First, coils of wire are dipped in tubs of concentrated sulfuric acid to remove scale and rust. When several batches have been cleaned, the used acid (spent pickle liquor) is discharged from the tubs. After the coils have been dipped in sulfuric acid, they are rinsed with water in different tubs to remove residual acid, generating the second effluent, rinse water.

Prior to 1979, Adcom discharged both the spent pickle liquor and the rinse water into a rubber-lined surface impoundment. Wastewaters in the rubber-lined surface impoundment were then treated at an on-site water treatment plant and discharged to an unlined surface impoundment, which in turn discharged into a ditch in accordance with Adcom's NPDES permit. The wastewater treatment plant produced a non-hazardous sludge from the treatment of the rinse waters, which was disposed of at a landfill.

In December of 1979, Adcom installed a Crown Acid Recovery System, which stored and recycled all spent pickle liquor from the pickling tub. With the installation of the system, Adcom ceased all discharges of spent pickle liquor to the former rubber-lined surface impoundment. The parties now agree that, because Adcom began using the Crown Acid Recovery System before November 19, 1980 (when the RCRA regulations became effective), the spent pickle liquor waste stream never became subject to regulation under RCRA.

From December of 1979 until February of 1982, Adcom continued to treat the rinse water (separate from the spent pickle liquor wastes), and to discharge the treated water into the unlined surface impoundment. The parties disagree over whether Adcom also continued to hold the untreated rinse water in the rubber-lined surface impoundment. Adcom takes the position that, after December of 1979, the rinse water was discharged directly into a treatment tank and that, therefore, the rubber-lined surface impoundment did not hold hazardous waste that could subject it to RCRA. The Region maintains that Adcom continued to store the rinse water in the rubber-lined surface impoundment before treatment and that, accordingly, the impoundment did become subject to RCRA. *See* 40 CFR §264.1(b) (RCRA regulations apply to owners or operators who store hazardous waste). The parties do agree that, sometime around February of 1982, Adcom modified its rinse water system to reclaim rinse waters, using a closed loop recovery system that eliminated all discharges to the surface impoundments.

On September 12, 1988, the Florida Department of Environmental Regulation issued a RCRA closure permit to Adcom to close the two surface impoundments (rubber-lined and unlined) discussed above. On November 27, 1991, the Region issued the HSWA portion of the permit now being challenged by Adcom. This appeal followed.

II. *DISCUSSION*

Under the rules that govern this proceeding, a RCRA permit ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. *See* 40 CFR §124.19; 45 Fed. Reg. 33,412 (May 19, 1980). The preamble to §124.19 states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." *Id*. The burden of demonstrating that review is warranted is on the petitioner.

In its appeal of the HSWA permit, Adcom first argues that, for several reasons, a HSWA permit may not be issued to it. Adcom then argues that, if the Region does have authority to issue a HSWA permit, the permit should reflect certain "technical comments" that Adcom submitted to EPA during the comment period on the draft permit. The issues raised by the appeal are addressed below.

A. *Treatment, Storage, or Disposal of Hazardous Waste*

Adcom argues that the Region does not have authority to issue a corrective action permit for releases from the rubber-lined surface impoundment because Adcom never treated, stored, or disposed of hazardous waste in the impoundment on or after November 19, 1980, when the RCRA regulations went into effect. [3] The Region now agrees that the spent pickle liquor never became subject to regulation under RCRA (*see* Region's Response to Petition for Review, at 7), so the resolution of this issue turns on whether Adcom's second effluent, rinse water, was a hazardous waste stored in the rubber-lined surface impoundment. Adcom's argument, however, focuses almost exclusively on spent pickle liquor and

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[3] *See* 45 Fed. Reg. 33,068 (May 19, 1980).

summarily argues that its handling of the rinse water did not trigger RCRA jurisdiction. [4]

The Region responds that, on and after November 19, 1980, the rinse water had the hazardous waste characteristic of corrosivity and was stored in the rubber-lined surface impoundment before it was treated. The Region cites a February 24, 1981 submission to the Region, in which Adcom (through its affiliate, Leggett & Platt, Inc.) stated that the rinse water generated at the Adcom facility had a pH of 2. Petition for Review, Exhibit 5. The Region also cites 40 CFR §261.22(a)(1), which provides that a solid waste that is aqueous and has pH less than or equal to 2 exhibits the hazardous waste characteristic of corrosivity. The Region concludes, therefore, that the rinse water was a characteristic hazardous waste. [5] The Region also argues that, between November 19, 1980 and February of 1982, Adcom held rinse water in the rubber-lined surface impoundment before treating the rinse water in the wastewater treatment tank. In support of its position, the Region cites a groundwater monitoring plan, dated November 21, 1983, submitted to EPA by Environmental Science and Engineering, Inc. (ESE), Adcom's consultant. Region's Response to Petition for Review, Exhibit 7. ESE's plan states that the rubber-lined surface impoundment was used to hold rinse water until February of 1982. The Region also cites the closure plan submitted by ESE to FDER for Adcom's rubber-lined surface impoundment. Region's Response to Petition for Review, Exhibit 8. That plan also states that the rubber-lined surface impoundment was used for holding rinse water until February of 1982. On the basis of these documents, the Region concludes that the rinse water did become subject to regulation under RCRA since the rinse water, a hazardous waste, was stored in a surface impoundment on or after November 19, 1980. [6]

The record contains two flow diagrams that bear on whether the rubber-lined surface impoundment was used to hold rinse water on or after November 19, 1980. Region's Response to Petition for Review, Exhibits 12 & 13. Exhibit 12 is a flow diagram of the facility, prepared by Adcom, which purports to show the

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[4] The petition for review states that after November 19, 1980, the rinse water was discharged directly into the wastewater treatment tank, where is was rendered non-hazardous. Petition for Review, at 4.

[5] Adcom does not dispute in its petition for review that its rinse water had a pH of 2 during the relevant period.

[6] The Region concludes that untreated rinse water placed in the rubber-lined surface impoundment after December 1979 must have been released to the environment because Adcom itself admitted that there was a hole in the rubber liner (Region's Response to Petition for Review, Exhibit 10) and because one of the substances found near the surface impoundment, KO62 (spent pickle liquor), indicates that the hole must have formed before December of 1979, the last time KO62 was placed in the rubber-lined surface impoundment. *See* Petition for Review, at 6.

movement of wastewater through the facility during the period between December 1979 and January 1981. The arrows on the diagram indicate that rinse water from the facility moved directly from the rinsing tubs to the wastewater treatment tank without first being held in the rubber-lined surface impoundment. Adcom cites this flow diagram in support of its assertion that, on and after November 19, 1980, the rinse water was discharged directly into the wastewater treatment tank. Exhibit 13, also a flow diagram prepared by Adcom, purports to show the movement of the wastewaters generated at the facility between January 1981 and February 1982. The arrows on this diagram also indicate that rinse water moved directly from the rinsing tubs to the wastewater treatment tank, without first being held in the rubber-lined surface impoundment.

The Region responds that there are "circumstances surrounding these exhibits that substantially diminish their accuracy." Region's Response to Petition for Review, at 14. First, the Region points out that both exhibits are undated and were not included in EPA's or FDER's administrative record until Adcom filed its comments to the draft HSWA portion of the permit. The Region speculates that the exhibits "were probably developed during Adcom's comments to the draft permit and in support of the permit appeal that Adcom was contemplating to file." *Id*. at 14-15.

The record also contains two affidavits containing the testimony of two former Adcom employees. Region's Response to the Petition for Review, Exhibits 15 & 16. In the affidavits, the former employees state that the process description in the ESE closure plan relied on by the Region is incorrect and that the rubber-lined surface impoundment was taken out of service between December 1979 and July 1980. The Region responds that the two affidavits should be disregarded because their focus is on spent pickle liquor and not on the rinse water. The Region also points out that the two employees were testifying about events that occurred roughly ten years ago and may have had only dim recollections of such events.

After thoroughly considering the record, we have come to the following conclusions on the issue of whether the rinse water was subject to regulation under RCRA. First, the Region was not clearly erroneous in determining that the rinse water was a hazardous waste. Adcom itself stated that the pH of the rinse water was 2, establishing that the rinse water had the characteristic of corrosivity. *See* 40 CFR §261.22(a)(1). Second, while the evidence is conflicting and the issue is certainly not free from doubt, we conclude that the Region was not clearly erroneous in its determination that between November 19, 1980 and February of 1982, rinse water was held in the rubber-lined impoundment before being treated in the treatment tank. We do not believe that the Region was unreasonable in

placing more credence in the ESE groundwater monitoring plan and the ESE closure plan, which were prepared in 1983 and 1984 respectively, than it placed in the affidavits, which were prepared in 1991 for the purpose of challenging the permit and the undated flow diagrams. Accordingly, review of this issue is denied.

B. *Defects in, and Expiration of, State Permit*

Adcom argues that the Florida Department of Environmental Regulation issued the permit with full knowledge that a complete application had not been submitted. Adcom asserts that FDER advised EPA that "application deficiencies will be addressed through permit conditions." It contends that, because the application was deficient, the state-issued portion of the permit is invalid. The Region responds that under State law, Adcom had an opportunity to contest the permit after it was issued but did not take advantage of the opportunity. The Region argues that a challenge to the validity of the state portion of the permit on the ground that the application was defective is now time-barred.

We need not reach the issue of whether Adcom's argument is now time-barred under state law, for the argument must fail for a more fundamental reason: whether the permit application submitted to the State of Florida is defective is an issue that relates solely to the state-issued portion of the permit and is therefore not subject to federal administrative review. *See* RCRA §3006(b), 42 U.S.C.A. §6926(b) (authorized state program operates "in lieu of" federal program); 40 CFR §124.19(a) (limiting federal administrative review of RCRA permit decisions to those issued under §124.15 by U.S. EPA Regions); *BP Oil Company*, RCRA Appeal No. 89-13, at 1-2 (July 25, 1989) (issues relating to state-issued portion of the permit are not subject to federal administrative review under 40 CFR §124.19); *Vulcan Materials Company*, RCRA Appeal No. 87-1, at 1-2 (September 8, 1988)(same). Adcom in this proceeding cannot obtain review of the State-issued portion of the permit. Moreover, to the extent Adcom is suggesting that a valid state permit is a prerequisite to holding a corrective action permit, it is in error. Regardless of the validity of the state portion of the permit, the HSWA portion of the permit remains in effect. Adcom's permit provides by its terms that "if any provision of this permit * * * is held invalid, * * * the remainder of this permit shall not be affected thereby." Region's Response to Petition for Review, Exhibit 1, Severability Clause, at 4. Adcom has not questioned this provision. Further, the regulations governing state-issued RCRA permits expressly recognize that where, as here, the State does not have HSWA authority, it is EPA's obligation to issue the portion of the permit necessary to implement HSWA. *See* 40 CFR §271.134(f). EPA's HSWA authority is wholly independent of a delegated State's authority. Therefore, arguments concerning the validity of the State permit or portion of the

permit are irrelevant to the validity of EPA's HSWA permit. Accordingly, review of this issue is denied.

For the same reason, we are also denying review of Adcom's argument that the state-issued permit has expired. Adcom argues that the closure permit expired on November 11, 1991, and that the corrective action provisions of RCRA are not applicable since Adcom does not have a valid "base" permit. The Region responds that the State's portion of the permit did not expire on November 11, 1991, because Adcom submitted a petition for renewal of the permit on August 22, 1991, that is, prior to the November 11, 1991 expiration date of the closure permit. *See* Rule 17-4.080(3) of the Florida Administrative Code (if permittee requests extension of permit before expiration of permit, the permit will remain in effect until final agency action is taken on the request). We are of the view, however, that whether the state-issued portion of the permit has expired is an issue that relates solely to the state-issued portion of the permit and is therefore not subject to federal administrative review. Similarly, the validity of the state portion of the permit has no bearing on Adcom's HSWA obligations. *See* discussion in preceding paragraph *supra*. Accordingly, review of this issue is also denied.

C. *Adcom's Technical Comments*

Adcom argues that, if the Region has authority to issue the HSWA permit, the permit should be changed to reflect certain "technical comments" that Adcom submitted to EPA during the comment period on the draft permit. The petition for review does not repeat the technical comments but merely incorporates by reference a letter sent to EPA during the comment period. Petition for Review, Exhibit 62. In its response to the petition, the Region does not respond to Adcom's technical comments individually, but makes instead the general argument that Adcom has not identified any clearly erroneous findings of fact or conclusions of law or exercises of discretion that should be reviewed. [7]

We agree with the Region. Under 40 CFR §124.19, which governs RCRA permit appeals, a petitioner is required to include in the petition for review:

> [A] statement of the reasons supporting that review, including * * * a showing that the condition in question is based on:

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[7] The Region also incorporates by reference its responses to Adcom's technical comments, which the Region issued along with the final permit. (Region's Exhibit 28.)

> (1) A finding of fact or conclusion of law which is clearly erroneous, or
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> (2) An exercise of discretion or an important policy consideration which the Environmental Appeals Board should, it its discretion, review.

To satisfy the requirements of 40 CFR §124.19(a), it is not enough for Adcom to include in its petition for review a mere reference to comments made during the comment period on the draft permit. *Cf. City of Los Angeles, Department of Public Works (Hyperion Water Pollution Control Plant)*, NPDES Permit No. CA0109991 (JO, August 29, 1983) (in appeal of denial of evidentiary hearing request, mere incorporation of hearing request in petition for review, without statement of "supporting reasons" as required by Section 124.91(a)(1), is not sufficient to demonstrate clear error or important policy consideration). If Adcom wishes to appeal issues raised during the comment period, it must not only identify the issues in the petition for review, but also show why the Region's responses to the issues are clearly erroneous or involve important policy considerations or exercises of discretion that should be reviewed. Because Adcom did not meet the requirements of 40 CFR §124.19, review of the technical issues raised in Adcom's comments on the draft permit is denied.

III. *CONCLUSION*

For all the foregoing reasons, we conclude that: (1) the Region was not clearly erroneous in its determination that the rinse water generated by Adcom's facility was a hazardous waste subject to regulation under RCRA; (2) whether the state-issued portion of the permit is defective or has expired are issues that relate solely to the state-issued permit and are not subject to federal administrative review or relevant to the validity of the EPA-issued HSWA portion of the permit; and (3) Adcom's incorporation by reference of certain "technical comments" that Adcom made during the comment period on the draft permit does not meet the requirements of 40 CFR §124.19(a). Review of Adcom's petition is therefore denied.

So ordered.